LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
SEP 18 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 374

JAMES A. TOTTEN,
d/b/a TOTTEN AND DUNN COMPANY,
Petitioner,

v.

LOCAL 43 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

S. DEL FUSTON,
507 Maclellan Building,
Chattanooga, Tenn., 37402,

Attorney for Respondent

TABLE OF CONTENTS.

	Page
Question Presented	2
Statement of the Case	3
Argument	5
Conclusion	8

CITATIONS.

General Drivers v. Riss & Co. 372 U.S. 517	6
United Steelworkers of America v. American Mfg. Co. 363 U.S. 565	8
United Steelworkers v. Enterprise Corp. 363 U.S. 593	8
United Steelworkers v. Warrior & Gulf Navigation Co. 363 U.S. 574	8

INDEX TO APPENDIX

Letter from General Counsel, National Labor Relations Board	1b

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. .....

JAMES A. TOTTEN,
d/b/a TOTTEN AND DUNN COMPANY,
Petitioner,
v.

LOCAL 43 OF UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES
OF THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES
AND CANADA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

May it please the Court:

The petitioner has correctly referred to the opinion below and no question is raised concerning jurisdiction.

QUESTION PRESENTED

We disagree with the question presented as phrased by the petitioner. In the Sixth Circuit the petitioner, then appellant, raised four questions. The one that most closely resembles the present proposed question was as follows:

CAN A DISTRICT COURT, AFTER A MATTER HAS BEEN SUBMITTED TO ARBITRATION, DETERMINE WHETHER THE CONCLUSIONS OF THE ARBITRATION IS LEGAL OR ILLEGAL?

Petitioner contended the District Court answered this question "No". In the brief of the respondent, then appellee, we agreed with that question but contended that the District Court answered the question, "Yes".

The principal question before the District Court and Court of Appeals was as follows:

CAN THE DISTRICT COURT ENFORCE THE AWARD OF AN ARBITRATION TRIBUNAL UNDER THE FOLLOWING CONDITIONS?

(a) THE CONTRACT PROVIDES THE EXCLUSIVE REFERRAL OF ALL EMPLOYEES SHALL BE FROM THE UNION HIRING HALL (WHETHER UNION OR NON-UNION) ON A NON-DISCRIMINATORY BASIS;

(b) THE EMPLOYER VIOLATES SAID CONTRACT BY HIRING NON-UNION EMPLOYEES WITHOUT CLEARANCE THROUGH THE HIRING HALL AND WITHOUT NOTIFYING THE UNION;

(c) WHEN THE EMPLOYER IS APPREHENDED THE UNION CANCELS THE CONTRACT UNDER A SECTION PROVIDING FOR CANCELLATION IN THE EVENT THE EMPLOYER VIOLATES SAID CONTRACT, AND

(d) THE EMPLOYER INVOKES THE GRIEVANCE PROCEDURE WHEREUPON AFTER AN IMPARTIAL HEARING THE ARBITRATION TRIBUNAL UNANIMOUSLY DECIDES AGAINST THE EMPLOYER AND AFFIRMS THE ACTION OF THE UNION.

THE DISTRICT ANSWERED THIS QUESTION "YES".

THE RESPONDENT CONTENDS THE DISTRICT COURT AND COURT OF APPEALS WAS CORRECT IN ANSWERING THIS QUESTION "YES".

STATEMENT OF THE CASE

To clarify the petitioner's statement of the case, the following facts are submitted:

The Collective Bargaining Agreement (6a) under Article VI (10a) states at Section 1 that applications for jobs shall be on a non-discriminatory basis, and shall not be based on, or in any way affected by...union membership. The agreement incorporates the Hiring Hall Plan (42a). The Hiring Hall Plan provides in Section 2 that the exclusive hiring of employees shall be through the Union. Section 5 provides that referrals shall be on a non-discriminatory basis - without regard to union membership. (44a, 45a)

The referral system under the Collective Bargaining Agreement follows a model plan suggested and advocated by the National Labor Relations Board. (Affidavit of C. Earle Williams. 38a) "Union Hiring Halls" an address by NLRB General Counsel Jerome D. Fenton, 42 LRRM 101, "Reasoning Behind NLRB's Hiring-Hall Standards". An address by NLRB member Joseph Alton Jenkins, 44 LRRM 71.

The Union could have no objection to any employer securing non-union plumbers so long as they were cleared through the Hiring Hall. (Affidavit of C. Earle Williams, last paragraph at 40a). Most important to the Union was that all plumbers be cleared through the Hiring Hall as this would be the only means the Union would have of policing the Contract; viz., knowing who was working and then checking to establish if the employer was paying the agreed scale and especially the fringe benefits. (Affidavit of C. Earle Williams, 38a to 40a).

The contention of the Union was that the employer was not clearing its non-union men through the Hiring Hall for the specific purpose of avoiding payment of the agreed scale and fringe benefits under the Collective Bargaining Agreement. (39a, 40a). Accordingly, the Union cancelled the contract in accordance with Article XXV (30a). The action of the Union immediately precipitated the action of the employer in invoking the arbitration procedure by written application to the Joint

Conference Board in accordance with Article XXI of the Agreement, (26a).

A hearing was duly held and a unanimous decision of the Arbitration Tribunal was against the employer and in favor of the Union (59a).

The Joint Conference Board kept detailed minutes of the hearing, including a narrative transcript of the evidence and the reasons for its findings. (59a).

ARGUMENT

The District Court obviously inquired into the question of arbitrability and found no grounds to reverse the decision of the Joint Board. The petitioner is unhappy with the award because the Board failed to find in his favor.

The petitioner questions whether or not the hearing before the Joint Board was an Arbitration. Apparently the petitioner feels the words "right to appeal" negates an Arbitration hearing.

Black's Law Dictionary defines "appeal" as follows:

> " 'Appeal' has no conclusive meaning, and it is necessary in each instance to look to the particular act giving an appeal, to determine powers to be exer-

cised by the appellate court. *McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 104 A 617, 620.

"An 'appeal' in equity is a trial de novo. *Simmons v. Stern* (C.C.A.) 9 F (2d) 256, 259.

" 'Appeal" may also be used to denote the act of invoking another judicial forum for the trial. *Newell v. Kalamazoo Circuit Judge*, 215 Mich. 153, 183 N.W. 907, 908. See appealed. As used in statutes authorizing taxpayers or parties to condemnation proceedings to appeal, the term often has its non-technical sense meaning to 'apply for' or 'ask'. " (Citing Cases)

The parties simply used the term "right to appeal" in the Contract as meaning to denote the act of invoking the arbitration hearing.

In any event, the question of the type of arbitration invoked herein has been settled by this Court in the case of *General Drivers v. Riss & Co.*, 372 U.S. 517, wherein it was held:

"It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for the settle-

ment of their differences under a collective bargaining agreement is given full play'. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under Section 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, 567-578, 46 LRRM 2414; cf. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670".

In the present case the parties negotiated a comprehensive agreement. They chose a "Joint Conference Board" to settle their disputes. The ambit of this Joint Conference Board, Article XXI, is all inclusive and provides as follows:

"This Board shall handle all grievances as they arise between the contractors and the Local Union (except jurisdictional disputes) and any other matter that may affect both organizations". (Underscoring ours)

The District Court, after reviewing the undisputed facts, stated in its Opinion as follows:

"No counter-affidavits have been filed.

> Accordingly, there appears to be no genuine issue of fact but that the dispute between the plaintiff and defendant on the termination of the Contract was submitted to the Joint Conference Board as provided in Article XXI of the Contract and that the Joint Conference Board decided the issue in favor of the Union".

The Court then held under the Steel Workers triology, the Court would not be permitted to weigh the merits of the Arbitration Decision, citing the following cases:

> *United Steel Workers of America vs. American Mfg. Co.*, 363 U.S. 565;
>
> *United Steel Workers vs. Warrior & Gulf Navigation Co.*, 363 U.S. 574;
>
> *United Steel Workers vs. Enterprise Corp.*, 363 U.S. 593.

CONCLUSION

The respondent contends that the District Court and the Court of Appeals for the Sixth Circuit were correct in their decisions. Petitioner's contentions were also submitted to the Tenth Region of the National Labor Relations Board, which found against him. Respondent then appealed to the General Counsel of the National Labor Relations Board,

who found no violation of the National Labor Relations Act, as amended. The decision of the General Counsel is attached hereto (Appendix, Page 1b).

Based upon the foregoing decisions and the reasons contained herein the respondent respectfully insists that the petition should be denied.

S. DEL FUSTON
507 Maclellan Building
Chattanooga, Tennessee 37402

Attorney for the Respondent

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel

Washington D.C. 20570

December 6, 1966

Re: Plumbers & Steamfitters Local No. 43
(Totten & Dunn)
Case No. 10-CB-1632; 10-CB-1632-2

William G. Haemmel, Esq.
Humphreys and Hutcheson
Maclellan Building
Chattanooga, Tennessee 37402

Dear Mr.Haemmel:

Your appeal from the Regional Director's refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Under all the circumstances, the burden of establishing that the Union had caused or attempted to cause the Company to discriminate against employees Simpson and Tudor could not be sustained. In view of the evidence that other contractors employed nonunion employees without objection from the Union, that such contractors cleared such hirings through the hiring hall in accordance with the prevailing practice under the exclusive hiring agreement and that there apparently were no unemployed plumbers for

whom the Union was seeking to create work opportunities, and as there was no evidence that the Union, in its several visits to Company jobsites,made any effort to induce the Company to get rid of these employees, the incident of June 21 at the Union hall, wherein the Union is alleged to have made some reference to the "nonunion" status of such employees, was deemed to provide insufficient basis, standing alone, for an unfair labor practice finding. In these circumstances, and in view of the Company's failure to make the welfare payments and meet the wage scale required thereunder, the Union's cancellation of its contract with the Company was not deemed to constitute an attempt to cause discrimination within the meaning of Section 8(b)(2) of the Act.

Arnold Ordman
General Counsel

By /s/ Irving M. Herman
Director, Office of
Appeals